between them was made imperative. The insured under a valued policy abandoned the ship and collected the insurance. Later he recovered a larger amount from the one who had caused the loss. By the first theory this entire amount would go to the insurer; but the court adopted the second view, and allowed the insurer only what he had paid the insured. *The Livingstone*, 130 Fed. Rep. 746 (C. C. A., Second Circ.).

The correctness of the first theory depends upon the effect of the abandonment of a ship. There is nothing in its nature which makes it different from the abandonment of any other property. When accepted by the insurer it makes him the owner of the ship and entitles him to all rights incident to the property, for example, the right to freight not earned before the completion of the voyage.[4] But it does not give him rights not incident to his ownership, such as the right to freight earned either *pro rata* or by delivery of part of the cargo before the casualty.[5] The claim against the tort-feasor did not arise from the violation of a right, incident to the insurer's ownership. The tort-feasor did no damage to the property after the insurer became the owner. This claim, then, differs in nature from the *spes recuperandi* with which it is so often confounded[6] and from all other claims which are based upon the ownership of property transferred by the abandonment. It would seem, therefore, that the origin of the insurer's claim to the money recovered from the tort-feasor must be explained on the theory of subrogation.

There seems to be nothing in the nature of a valued policy to prevent the application of principles of subrogation. The mere fact that it is valued does not change its nature as a contract of indemnity. That simply fixes the amount which as between the insurer and insured shall be taken as the valuation in case of total loss. Consequently the insured, when paid this amount, cannot complain if the insurer is given all sums recovered up to the amount of the valuation, no matter what is the real value of the ship. But since the only reason the insurer has any claim upon the sums recovered by the insured is that he has paid for a loss which later is otherwise recompensed, it is obvious that his claim must be commensurate with the amount paid and must be satisfied when that amount is returned. It is not a violation of equitable principles for the insured to receive a full recompense even though that recompense exceed a valuation which he had previously made; and, in any case, it is difficult to see how the insurer, fully recouped, can have any claim for the excess.

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IMPOSSIBILITY BY LAW AS EXCUSE FOR BREACH OF CONTRACT. — Of the grounds commonly recognized as affording a defense to actions upon contract, none is more clearly established than impossibility by operation of domestic law. The rule governing these cases has been applied where the promisor has been prevented from lawfully carrying out his obligation by the acts of the executive branch of the government as well as where the impossibility is due to subsequent legislative enactments.[1]

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[4] Mason *v.* Marine Ins. Co., 110 Fed. Rep. 452.
[5] Red Sea, [1896] P. 20.
[6] Rogers *v.* Hosack's Executors, 18 Wend. (N. Y.) 319.

[1] Touteng *v.* Hubbard, 3 Bos. & Pul. 291; Cordes *v.* Miller, 39 Mich. 581; Baily *v.* De Crespigny, L. R. 4 Q. B. 180.

Where the law has intervened to make performance of the contract impossible, the promisor is excused primarily on grounds of public policy, and not from any notion of indulgence. The rule is generally recognized, that a contract for an illegal object is void on its face; and the time fixed for performance is plainly the time at which the legality of the object is finally to be determined. Clearly, then, it is immaterial whether or not the promisor might have anticipated that the thing which he has promised to do, and which was lawful at the time he contracted, would subsequently become unlawful.[2] The absolute, arbitrary bar to the enforcement of the contract is present, irrespective of the intention or knowledge of the parties. In cases where the element of illegality is not present, because the defense interposed is impossibility due to foreign, as distinguished from domestic, law, the courts have generally refused to excuse the promisor.[3]

In contracts where performance has become impossible in fact, however, the defense is in its nature equitable, resting upon the injustice of enforcing an absolute legal obligation under all circumstances;[4] and if the impossibility might have been foreseen by the promisor, the equitable grounds upon which he claims relief must fail.[5] The importance of this distinction between impossibility in fact and impossibility in law is illustrated by a case lately decided in the United States Supreme Court. During the war between China and Japan a carrier contracted to transport copper from New York to Yokohama. The government official at Tacoma, however, refused to clear the vessel carrying the copper, on the ground that as contraband it could not legally be exported to Japan. The ship accordingly sailed without it. The following day it appeared that there was no legal objection to the exportation. It was held that the mistake of the official was no defense to the carrier in view of circumstances showing that it had taken the risk of any trouble arising from the nature of the goods. *Northern Pacific Railway Co.* v. *American Trading Co.*, 25 Sup. Ct. Rep. 84. Although the agent of the government had acted within the scope of his employment, that fact could not operate to give validity to his unauthorized act, and the breach of the contract was not due strictly to the operation of law. Consequently, since the principles of public policy upon which an illegal contract is declared void, did not apply, the promisor had no absolute defense. The case was, accordingly, determined upon the same principles as cases presenting a supervening impossibility of fact, with emphasis placed upon the assumption of risk by the promisor. Thus, if the official abuse of discretion could not have been anticipated, one so prevented from performing should have been protected. Where the defense interposed is impossibility due to foreign law, there is a situation closely analogous, and it would seem that the result should be worked out along the same equitable lines.[6]

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EXEMPTION OF MUNICIPAL PROPERTY FROM STATE TAXATION. — A municipality being, within its territory, an agency of the state for the exercise of governmental functions, a general rule of exemption excludes prop-

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[2] *Cf.* Esposito *v.* Bowden, 7 E. & B. 763, 789, 790.

[3] Barker *v.* Hodgson, 3 M. & S. 267; Blight *v.* Page, 3 Bos. & Pul. 295, note *a*; Tweedie Trading Co. *v.* McDonald Co., 114 Fed. Rep. 985.

[4] 15 HARV. L. REV. 418.

[5] Jennings *v.* Lyons, 39 Wis. 553; Bryan *v.* Spurgin, 5 Sneed (Tenn.) 681.

[6] See 16 HARV. L. REV. 64.